from the desk of
Tom G. Glass

11510 Summerhill Ln.
Houston, TX 77024
tomglass@juryduty.org

(713) 656-7658 (daytime)
(713) 467-2989 (evening)
www.rule-of-law.info

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Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposal by Joseph Weeks to Require Written Explanations for Appellate Dispositions

Dear Mr. McCabe:

Please forward this letter to the members of the Advisory Committee on Appellate Rules as they prepare for the May 15, 2003 meeting of the committee and the consideration of the proposal by Professor Joseph Weeks to require written opinions explaining the law as applied to the facts of the case in each disposition.

I support Professor Weeks' proposal.

I come to the committee as an American citizen who cares about the judicial system because the fair and just administration of the law is a bedrock upon which rests all values which Americans hold dear. I am not an attorney, but have been drawn into studying appellate procedure because of the nightmarish experience a family member of mine has experienced, in which a ruinous "inherent power" sanction well in excess of $100,000 was issued against a represented plaintiff in a lawsuit without any stated or actual facts, any law, any hearing, or any explanation at the district level, and then again without any explanation by a federal appellate court. My goal is to make sure that such an injustice never again happens to any American citizen.

My main points on required appellate written reasoning can be summarized as:

- The design of a process determines its quality - explanation is required for respectable process
- The confidence of the American people in the Judiciary is threatened by lack of explanation
- Openness, transparency, and proper oversight require written reasoning

Process Matters

I am a businessman with a degree in Chemical Engineering from Texas A&M and an MBA from Harvard. As a young man, I did not understand the concept of due process. It was not until the quality/continuous improvement concept of business management swept through the business world in the early 1990's that I finally understood it. In business, the core concept of the quality movement is that a well designed process is key to consistent, high quality output. Once I understood that, it dawned upon me that process in governmental affairs matters, too.

It is my opinion that one of the keys to American business success in the 1990's was the commitment to implementing and improving process. The best companies now work toward processes that only allowed one mistake for one million instances of production. One in one hundred mistakes is considered to be an insufficient process.

I bring that perspective to the study of our judicial system and due process. Judge Patrick Higginbotham of the Fifth Circuit has said ". . . the simple mission of the court of appeals, which is error correcting and not lawmaking. By way of accent, I would accent the error correcting function of it."[1] Professors/Deans Paul Carrington, Daniel Meador, and Maurice Rosenberg have said that, "the functions of appellate adjudication are two-fold. One is to 'review for correctness'."[2]

If American business can design processes with only one in a million mistakes for widget production, how much more important is it that the American Judiciary design a process that produces as few mistakes as possible, given that American citizens' lives are at stake? The reason why explanations of the legal rationale are so important in every case is that they minimize the chance for mistakes, or even worse, the appearance or actuality of bias or corruption. On the other hand, a process that allows the error correctors to withhold reasons for their decisions guarantees mistakes and is an embodiment of Murphy's Law – that which can go wrong, will.

Public Confidence in the Judiciary Matters

Besides giving the American people the best process possible, required appellate explanations also stops one of the most corrosive phenomenon that can happen to a nation - the lack of confidence by the people in the legitimacy of its Judiciary. In a dissent of an ***en banc*** **decision** without written rationale in *United States of America v. McFarland*, 00-10569, (5th Cir. 2002), Judge Edith Jones quoted Professors Carrington, Meador, and Rosenberg:

> When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy court, the reasons are an essential demonstration that the court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid. (emphasis added by Judge Jones)[3]

Judge Richard Arnold, of the Eighth Circuit, said:

> The third duty of the court is to write an opinion which is intelligible, which explains the result, and which we hope, is acceptable to the losing side. I think about the losing litigants a lot. Those are the people who need to understand that they have been heard – that a reasoning creature of some kind has evaluated their argument and comes to some sort of conclusion about it. They won't like it; they won't enjoy losing, but I hope that they will have a sense that they have been heard.[4]

Chief Judge Carolyn Dineen King, of the Fifth Circuit, said:

> I think there are many cases in which the litigants would more likely persuaded that we have at least paid some attention to their case if we gave succinct particularized reasons for the decision. . . . [G]iving reasons, however brief, provides a basis for accountability for the court and for the whole judicial system so I think that a short statement of reasons ... is important, and I would encourage that on my own court.[5]

Judge Robert Parker, of the Fifth Circuit, said in his prepared remarks at the same hearing:

> Instead we will witness an *incremental corruption* of case management techniques. *Discretionary review* will take the form of *one word or one paragraph dispositions* on the summary calendar. The conference calendar will dispose of more cases with less conference. It is a small step for the jurisdictional defect calendar to be expanded to encompass cases that have merit defects (as determined by central staff attorneys); and all the while, we will be holding ourselves out as providing plenary review for all appeals. *With good intentions driven by the need to dispose of our docket, we will compromise the integrity of the court by providing a level of review that is in fact not plenary.* It matters not that we may not realize it or that we may have no other choice, the result will be the same. The difference between what we say we are doing and what we will actually be doing will not go unnoticed by pundits, the academy, and the bar. *We will erode confidence of the public in the federal courts*. Discretionary review in the guise of case management techniques will not play in Peoria or New Orleans or anywhere else. (emphasis added) [6]

The advocates of this practice of issuing rulings without rationale that threatens to undermine the American system offer only one explanation - the large and ever growing caseload of the federal Judiciary. I refuse to accept that as a consequence of growth of population (and increasing burdens placed on the federal Judiciary) that we must accept an ever decreasing level of justice and an ever increasing level of corruption and distrust by the American system in our Judiciary.

I recognize that the Judiciary does not have the power to increase the judicial resources available to handle the workload imposed upon it. But, assuming that more resources are needed to provide a process with minimal mistakes, the Judicary does have the responsibility to continue to make sure that the Congress knows that while it fiddles in partisan wrangling over filling existing judicial slots that more resources beyond that are needed to provide the justice due every American citizen. If necessary, the Judiciary also has the responsibility to slow the system down before implementing in the name of efficiency mechanistic procedures that have the potential for many mistakes and to undermine the Judiciary.

Such a drastic slowdown may not be necessary, however, to gain proper process. In the August 1999 issue of the *ABA Journal*, William C. Smith quoted Chief Judge Edward Becker of the Third Circuit as he discussed that circuit's concerted effort to greatly reduce the number of rulings without comment. The stated statistics at the time had reduced rulings without comment from 52.9% in 1997 to 12.6% in 1999, and the 2002 statistics for the Third Circuit show an even further reduction to 2.8%. "We realized that this [the large number of cases without comment] was a mistake, that we owed the bar more." Chief Judge Becker said. The 1999 article went on to say, "According to Judge Becker, the court has so far managed to keep current on its work, defying fears that decreasing judgment orders would necessarily increase the circuit's backlog." Judge Becker is quoted as saying about the policy of providing rationale, "It was the right thing to do, so we just did it."[7]

Openness, Transparency, and Oversight Matter

The practice of issuing unpublished opinions without any rationale is fundamentally an issue of openness and transparency in justice. In the Fifth Circuit and Eleventh Circuit, no effective oversight is possible in 86% of the cases because they do not provide their unpublished cases to the electronic reporting services. We do not even know whether the reported statistics of reasoned vs. without comment are done properly. That is why I support another proposal before the Advisory Committee that requires all written opinions of the appellate courts to be provided to the electronic reporting services. Even with proper reporting and classification, however, issuing the remaining rulings without comment does not provide the transparency that should exist in America (and that I might add, about which America preaches to developing countries.)

And finally, I feel compelled to make a statement that I presume - because of the position of power of federal appellate judges - is not often made. It has been said that the issues are often not the issue. Usually the real issue is power. Although one can never know with certainty the motives of others, I, quite frankly, have doubts that the stated rationale of excessive workload is the real issue with those who defend and use unexplained affirmance. I suspect that the secrecy with which unexplained affirmances are issued allows each appellate judge the luxury of exercising his or her own preferences without the confines of law, circuit precedent, or higher authority. I think the dark secret is that many judges like the power and the lack of hard, sometimes tedious work of which this practice relieves them. (Given these suspicions, I conclude that the practice of affirmance without opinion is already corroding MY confidence in our system!)

But to give up on the Judiciary is to give up on the shining idea of America, and I refuse to do that. If you think a bit about the current practice of issuing rulings without reasoning, essentially, the judges who issue the unexplained affirmances are asking the rest of the country to trust them. Our nation was not founded upon a principle in which those in power, especially those with lifetime appointment, are to be trusted. The Founders knew that power warps the perspective of even the best of human beings. And they knew that a system that demands that those in power be trusted without oversight is one that is guaranteed in the long term to attract those who are NOT the best of men.

I urge the Advisory Committee on Appellate Rules and the Judicial Conference to work toward a process that produces as few mistakes as possible, a process that is worthy of the trust of the American people, and a process that does not call upon the un-American principle of trusting human beings with great power to behave properly without appropriate oversight. Please vote to require written, legal reasoning to be required in all appellate dispositions. If no child should be left behind in American schools, let's make sure that no litigant is left in the dark in American courts.

Toward liberty and justice for all,

Tom Glass

P.S. I have covered some of the topics associated with affirmance without opinion in this letter, but I have built a web site that has much more information on the topic. The site is www.rule-of-law.info and I invite you to go visit the site. I have amassed a pretty significant list of quotes, references, statistics, list of victims, news, and compilation of local circuit rules there.

[1] Dallas hearing transcript of Commission on Structural Alternatives for the Federal Courts of Appeals, March 25, 1998, http://www.library.unt.edu/gpo/csafca/hearings/daltrans.pdf, p.55.
[2] Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg, Justice on Appeal, 2 (West 1976).
[3] *Id.*, p. 10
[4] Richard S. Arnold, *The Future of the Federal Courts*, 60 Mo. L. Rev. 533, 536 (1995)
[5] Cited above, Dallas hearing of Commission on Structural Alternatives, p. 37
[6] Prepared remarks for Dallas hearing of Commission on Structural Alternatives for the Federal Courts of Appeals, March 25, 1998, http://www.library.unt.edu/gpo/csafca/hearings/dallas/parker.htm
[7] William C. Smith, *Big Objections to Brief Decisions*, ABA Journal, August, 1999, p. 34, 36